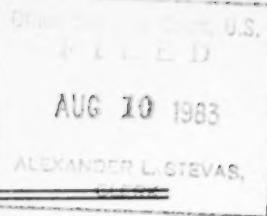


No. 83-77



In The
Supreme Court of the United States
October Term, 1983

ATLANTIC PURCHASERS, INC.,
STELLA MARIS INN, LTD.,

Petitioners,

vs.

AIRCRAFT SALES, INC.,
DONALD J. ANKLIN,

Respondents.

**RESPONSE TO PETITION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

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QUESTION PRESENTED

In a breach of warranty and fraud action specifically seeking compensatory and punitive damages, did the trial court abuse its discretion in refusing to award treble damages and attorney fees pursuant to North Carolina General Statutes § 75-1, *et seq.*, when requested by plaintiffs initially one month post-verdict?

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Pursuant to the authority of Rule 19 and in the manner provided by Rules 22 and 33 of the Rules of the Supreme Court of the United States, Aircraft Sales, Inc. and Donald J. Anklin respond to the petition of Atlantic Purchasers, Inc. and Stella Maris Inn, Ltd., and request that this Court deny the petition on the basis of the facts and authorities hereinafter set forth for the Court's consideration.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in *Atlantic Purchasers, Inc., and Stella Maris Inn, Ltd. v. Aircraft Sales, Inc. and Donald J. Anklin*, 705 F. 2d 712 (1983).

JURISDICTION

The jurisdiction of this Court has been invoked pursuant to 28 U. S. C. § 1254 (1).

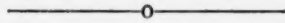
RULES AND STATUTES INVOLVED

N. C. G. S. § 75-1:

Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal. Every person or corporation who shall make any such contract expressly or shall knowingly be a party thereto by implication, or who shall engage in any such combination or conspiracy, shall be guilty of a misdemeanor, and upon conviction thereof such person shall be fined or imprisoned, or both, in the discretion of the court, whether such person entered into such contract individually or as an agent representing a corporation, and such corporation, shall be fined in the discretion of the court not less than one thousand dollars (\$1,000.00).

N. C. G. S. § 75-16.1:

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm, or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a *right of action* on account of such injury done, and if damages are assessed in *such case* judgment shall be rendered in favor of the plaintiff and against defendant for treble the amount fixed by the verdict. (Emphasis added.)



STATEMENT OF THE CASE

In September, 1979, within mere days of the running of the applicable three-year statute of limitations, plaintiffs filed a complaint seeking compensatory and punitive damages upon allegations of breach of warranty and fraud in the sale of an airplane.

Approximately one month after a favorable jury verdict encompassing both compensatory and punitive damages was rendered on September 14, 1981, plaintiffs requested that the damages be trebled and attorneys fees awarded pursuant to the provisions of North Carolina General Statutes §§ 75-16 and 75-16.1. The District Court determined it would be procedurally and equitably "indecent" to convert the case *after the verdict* into a suit under the North Carolina Unfair Trade Practices Act (J.A. K-2).

On appeal, the United States Court of Appeals, in a 2-1 opinion written by Circuit Judge Ervin, held the trial court's decision was not an abuse of discretion because a substantial increase in the defendant's potential liability

constituted specific prejudice barring additional relief to the plaintiffs under Rule 54 (c) (J.A. M-15) and fundamental fairness prevented this method of post-verdict ambush (J.A. M-16). Upon a poll of that Court on a suggestion of rehearing *en banc*, only Circuit Judges Bryon and Russell voted in favor of rehearing.



REASONS WHY THE WRIT SHOULD NOT ISSUE

Petitioners urge upon this Court an expansion of the "notice pleading" concept—trial by afterthought (if one assumes mere oversight) or trial by ambush (if one assumes the petitioners failure to raise the statutory cause of action until all fighting had ended was by design).

North Carolina General Statutes §§ 75-16 and 75-16.1, merely create an additional cause of action allowing unusual relief if the specific statutory relief is sought:

N. C. G. S. § 75.16 provides:

If any person shall be injured or the business of any person, firm or corporation shall be broken up, destroyed or injured by reason of any act or thing done by any other person, firm, or corporation in violation of the provisions of this Chapter, such person, firm or corporation so injured shall have a *right of action* on account of such injury done, and if damages are assessed in *such case* judgment shall be rendered in favor of the plaintiff and against defendant for treble the amount fixed by the verdict. (Emphasis added.)

N. C. G. S. § 75.16.1 provides:

In any suit instituted by a person who *alleges* that the defendant violated G. S. 75-1.1, the presiding judge may, in his own discretion, allow a reasonable attor-

ney fee to the duly licensed attorney representing the prevailing party, such attorney fee to be taxed as a part of the court costs and payable by the losing party upon a finding by presiding judge that:

- (1) The party charged with the violation has willfully engaged in the act or practice, and there was unwarranted refusal by such party to pay the claim which constitutes the basis of such suit, or
- (2) the party instituting the action knew, or should have known, the action was frivolous and malicious. (Emphasis added.)

The trial court's characterization of the plaintiffs' tardy attempt as "indecent" (J.A. K-1) was substantially echoed by the appellate panel's finding that fundamental fairness formed a solid foundation for the denial of the additional statutory liability sought by the plaintiffs. That panel found the plaintiffs had made their legal bed and the district court was completely justified in requiring that it lie in it.

The petitioners suggest that this Court should grant review so as to exercise its power of supervision (J.A. 18). Surely this Court need not concern itself with the review of purely discretionary rulings of its trial tribunals since the circuit panel found prejudice as an adequate basis for an exception to the liberal construction of Rule 54(c) of the Federal Rules of Civil Procedure and then coupled this determination with a conclusion that the plaintiffs' post-verdict demand lacked fundamental fairness. It is difficult to give much weight to petitioners' exhortation that "if the majority opinion below is allowed to become precedent, it will inevitably force counsel to engage in long detailed enumerations of even the most farfetched remedies in reciting a prayer for relief."

It is most respectfully contended that this Court's supervisory power can be better exercised elsewhere than to correct an oversight of trial counsel or to again review the discretion of the trial court when same has not only been reviewed by a three-judge panel of the appellate court but by the *entire* United States Court of Appeals for the Fourth Circuit (J.A. N-2).

O

CONCLUSION

For the foregoing reasons, Aircraft Sales, Inc. and Donald J. Anklin submit that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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